Citation: *R. v. Schafer*, 2021 YKTC 70

Date: 20211217
Docket: 20-00041
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Gill

REGINA

v.

NATHANIEL SCHAFER

Appearances:
Mina Connelly — Counsel for the Crown
Christiana Lavidas — Counsel for the Defence

RULING ON *VOIR DIRE*

[1] GILL T.C.J. (Oral): The accused, Nathaniel Schafer, is charged with the impaired operation of a conveyance and with operation of a conveyance having consumed alcohol in such a quantity that the concentration in his blood was at or more than 80 mg/% on or about March 19, 2020, in Old Crow, Yukon Territory.

[2] This is a ruling on a *voir dire* declared for the purpose of determining an application by the accused for exclusion of evidence pursuant to s. 24(2) of *The Canadian Charter of Rights and Freedoms*. Mr. Schafer alleges that in the course of the investigation, the police officer infringed a number of his *Charter* rights and freedoms that merit exclusion of evidence.

[3] Briefly, he alleges that the investigating officer, in failing to immediately advise him he was being detained for an impaired driving investigation, breached his rights pursuant to s. 10(a) of the *Charter*.

[4] It is further alleged that, in demanding and obtaining a roadside breath sample without the requisite suspicion that Mr. Schafer had alcohol in his body, the officer detained Mr. Schafer arbitrarily thereby breaching his s. 9 *Charter* right to not be arbitrarily detained, and his s. 8 *Charter* right to be free from unreasonable search or seizure.

[5] Lastly, it is alleged that in failing to provide Mr. Schafer sufficient access to counsel of his choice and in engaging in conversation with him, eliciting evidence prior to any such counsel access, it is alleged the officer breached Mr. Schafer's s. 10(b) *Charter* right to retain and instruct counsel.

[6] At approximately 10:45 p.m. on the date in question, the investigating officer arrived at a residence in Old Crow in connection with a report of an unknown female seen and heard screaming in the vicinity. While there, the officer determined this woman was the girlfriend of the accused, whom the officer saw pulling up in his Ski-Doo. Old Crow being a very small community, the officer knew Mr. Schafer quite well and recognized him immediately.

[7] The officer testified that when he went over to speak with Mr. Schafer and to reassure him about the situation, he made some observations about his condition. Those observations were that Mr. Schafer looked as he always does and that the only thing the officer could determine to be out of the ordinary was what he described as a

bit of a slur in Mr. Schafer's speech. Given his conclusion that Mr. Schafer's girlfriend had been drinking, it piqued his interest in that regard also with respect to Mr. Schafer. Although the officer, at this point, had in his mind a possible inference, or as he described it "a hunch", that Mr. Schafer also may have been drinking, given the lack of any further indicia of impairment, the officer believed he did not have any sufficient basis at that point to make a demand for a roadside breath sample.

[8] Given the foregoing, but for reasons not very well explained by him, the officer nonetheless, directed Mr. Schafer to go directly home and stay home for the rest of the night. Mr. Schafer accordingly departed as directed and the officer returned to the detachment where he retrieved a roadside screening device to take with him back on patrol. He did this because he now knew that someone had probably transported liquor into the alcohol-free community that day and he wanted to be prepared.

[9] Only 10 minutes later, while on patrol, he saw Mr. Schafer once again on his Ski-Doo outside the residence where the officer had attended earlier. The officer pulled up and, while seated in his vehicle from a distance of about 1.5 metres from Mr. Schafer, he asked him why he was back out. The officer testified they spoke for only about three minutes, during which he said he noted a mild smell of liquor off Mr. Schafer's breath. He could not recall if he asked Mr. Schafer whether he had been drinking.

[10] The officer testified he then read to Mr. Schafer the demand that he provide a roadside sample of his breath. The officer testified, at this point, he did not have any

opinion regarding impairment, only a reasonable suspicion that Mr. Schafer had consumed alcohol and that he had alcohol in his body and having operated his Ski-Doo in the immediate preceding three hours.

[11] The roadside screening device registered a fail, at which point the officer detained Mr. Schafer for impaired driving. The officer also relied on the fail reading to formulate reasonable and probable grounds that Mr. Schafer had operated a conveyance while his ability was impaired by the consumption of alcohol. He *Chartered* and warned Mr. Schafer, placed him in the rear of his police vehicle, and transported him to the nearby detachment.

[12] The first issue I wish to address his whether, on encountering Mr. Schafer the second time that evening, the officer immediately engaged with him to determine whether he was impaired.

[13] On this point, the investigating officer's own testimony is internally inconsistent and his line of reasoning somewhat difficult to follow. On the one hand, the officer at this point, explained he was mostly concerned about the risk of Mr. Schafer interacting with his intoxicated girlfriend, who was in a nearby home, in a way that could result in an escalation of her already existing volatile state, and that it was only during that conversation, in this regard, that he slowly transitioned into more strongly suspecting alcohol consumption by him. However, there is nothing in the evidence that would explain just exactly why the officer had this concern about the girlfriend and Mr. Schafer interacting with her.

[14] As a result, the officer, in my view, would really have no authority to question Mr. Schafer further from that perspective — and I do not believe this is what the officer was particularly concerned about in any event.

[15] I come to this determination because within a mere three minutes of encountering Mr. Schafer, the officer made a roadside screening demand. The officer testified that during those three minutes he could not recall if he asked Mr. Schafer whether he had been drinking and instead asserted he relied only on his previous observations and what he now said was a mild smell of liquor off Mr. Schafer's breath. However, later in his testimony, the officer testified that Mr. Schafer was frank about his alcohol consumption, which the officer said led him to making the demand.

[16] Therefore, according to that aspect of the officer's testimony, conversation during those three minutes must have included a discussion about how much Mr. Schafer had had to drink.

[17] There is more evidence supporting the notion that the officer was investigating Mr. Schafer for impaired driving from the very beginning of the second encounter. This is because, on the officer's own testimony, he told Mr. Schafer that he had given him a chance the first time when he had directed him to go home and stay there, and he admonished him for coming back out.

[18] Given that the officer did not have the roadside screening device with him on his first encounter with Mr. Schafer, the only reasonable inference to be drawn from the totality of evidence on this point is that the officer, having given Mr. Schafer a chance on the first encounter but now having the roadside screening device with him on seeing

him only 10 minutes later in apparent defiance of his earlier direction to go and stay home, the officer immediately commenced an impaired driving investigation, including eliciting whether Mr. Schafer had consumed any alcohol, all of which culminated in a roadside demand only three minutes later.

[19] Under these circumstances and having been told he had been given a chance the first time, I find that a reasonable person in the place of Mr. Schafer would have, on the second encounter, immediately discerned he was not free to leave but he had to stay and answer the officer's questions. Those questions, in light of what had transpired earlier, clearly portrayed the officer as embarking on an impaired driving investigation from the moment he encountered the accused the second time that evening.

[20] My having found that Mr. Schafer was detained for an impaired driving investigation from the very beginning of the second encounter with the police officer, I find the officer, in failing to so inform him, breached his s. 10(a) *Charter* right.

[21] I will deal next with the validity of the roadside screening demand.

[22] Here, a peace officer making such a demand is required to have reasonable grounds to suspect a person has alcohol in his or her body and has within the preceding three hours operated a conveyance.

[23] In the present case, the officer testified to a suspicion of alcohol consumption by the accused during his first encounter with him but to ambivalence about whether he had sufficient grounds to make a roadside demand at that time. As has already been

noted, the officer at that time did not have a screening device with him and, according to his own testimony during the proceedings, he had decided to give the accused a chance, directing him to go home.

[24] As already noted in these reasons, the officer testified he did form a reasonable suspicion sufficient to justify the screening demand on the second encounter very soon after the commencement of that encounter. He said he based that reasonable suspicion on a total of three factors:

- Firstly, an inference the accused may have been drinking because his girlfriend had been drinking;
- Secondly, on the basis of a very slight slurring of Mr. Schafer's speech; and
- Thirdly, a slight odour of alcohol emanating from Mr. Schafer's breath.

[25] The difficulty, once again, with the officer's testimony, in this regard, is that it is not consistent with things he said to the accused that very evening at the detachment and nor is it consistent with the officer's own testimony on the matter. There, he told the accused words to the effect that, honestly, when they first started talking during the second encounter, he had started to hear slurring of words, and on reading the result of the roadside screening test he could start smelling it a little bit.

[26] By that statement, it would appear the officer did not smell alcohol at the time he made the roadside screening demand but, rather, only moments afterward when he was actually taking the reading. On that basis, he could not possibly have relied on the smell of alcohol as a factor in making the demand. Given that, by the officer's own

admission, without the smell of alcohol he did not feel he had a reasonable suspicion to make any such demand, this raises a significant concern about the validity of that demand.

[27] During his testimony in both direct as well as cross-examination, the officer said he was merely speaking in generalities and that when he said he could start smelling it a little bit while reading the screening results, this did not mean that he did not smell alcohol before making the demand. That explanation, being in direct contradiction to the words plainly spoken by the officer to the accused at the detachment, I find it difficult to accept.

[28] This is all the more so given the officer took absolutely no notes of his observations at the time and further, the officer agreed his recollection at the time of trial was not as good as it would have been at the time of the event.

[29] Based on the foregoing, I find as a fact that the officer did not detect the odour of alcohol to support the roadside demand. Likely because of the lack of notes and lapse of time, the officer is mistaken in his recollection in this regard. Given the officer's earlier testimony that without the odour of alcohol, he did not have a reasonable suspicion, the demand lacks the required grounds and breaches Mr. Schafer's s. 8 *Charter* right to be secure from unreasonable search or seizure.

[30] Given the officer's testimony that he relied on the fail reading of the roadside screening test in order to formulate his opinion that the accused's ability to operate a

conveyance was impaired by the consumption of alcohol, it follows that his arrest on such a charge constitutes a breach of Mr. Schafer's s. 9 *Charter* right to be free from arbitrary arrest or detention.

[31] The subsequent demand and taking of breath samples would also be without reasonable grounds thereby grounding a s. 8 *Charter* breach.

[32] The next breach alleged by the accused relates to the implementation of his right to counsel, pursuant to s. (10) of the *Charter*. By directing him to obtain legal advice from duty counsel, the accused maintains he was unfairly limited in his choice of counsel.

[33] Here, I must respectfully disagree. At the scene, when Mr. Schafer was *Charter*ed and warned, and asked if he wanted to call a lawyer, he replied he has never been in trouble before and does not have a lawyer. The officer told him he could call anyone he wants or Legal Aid, to which the accused replied that, yes, he can do that.

[34] Thereafter at the detachment, the officer again presented Mr. Schafer with his right to counsel choices, namely, that he could flip through a phonebook and call anyone he wanted; or that he could call anyone he specifically wanted and the officer would help him locate that number; or thirdly, he could speak with Legal Aid. To that, the accused replied he would just speak with Legal Aid. As a result, the officer did not present Mr. Schafer with a phonebook and instead facilitated a device to him for a Legal Aid lawyer. In my view, the officer fairly presented to Mr. Schafer his access to counsel options and Mr. Schafer made his choice. He has not established, in my view, a breach of this s. 10(b) right to counsel on this basis.

[35] The final *Charter* breach alleged by the accused, also pursuant to s. 10(b) of the *Charter*, is that the officer improperly elicited incriminating evidence from Mr. Schafer while awaiting the callback from Legal Aid and before Mr. Schafer had received any legal advice. This is said to have occurred during what appears to have been a casual conversation between the officer and Mr. Schafer when the officer reiterated to him that he had given him a chance the first time to go home.

[36] To this, the accused replied that he agreed it was stupid of him to have come back out and been driving. The officer also told Mr. Schafer he was disappointed that he had failed the roadside screening test but he was still a great guy and, in fact, the officer had been hoping Mr. Schafer would pass the test, to which the accused replied he was not going to pass the test.

[37] The officer had also, as earlier noted in this ruling, discussed with Mr. Schafer how he had started to smell alcohol on his breath while taking the reading from the roadside screening device.

[38] The officer also engaged in conversation with Mr. Schafer while driving him to the detachment earlier. During that time, he said to Mr. Schafer that he had told him not to stay out. Mr. Schafer replied that he came back because his girlfriend wanted to get him to pick her up. This reply constitutes an admission of exercising care and control of the Ski-Doo.

[39] All of the foregoing constitutes the officer discussing with the accused the essential elements of impaired driving as well as evidence gathering in respect of that even if unintentional, including an admission of drinking as well as an admission of driving.

[40] The situation is further aggravated by the fact that this officer and the accused knew one another from other interactions in the community, including playing hockey together. This would lull a person in the position of Mr. Schafer to thinking he was speaking with the officer possibly as a friend when in fact he was making incriminatory statements that could be used against him in a trial such as this.

[41] All of this having occurred before Mr. Schafer had any opportunity to speak with a lawyer, I find it does indeed constitute inappropriate eliciting of evidence from the accused contrary to his s. 10(b) *Charter* right. This breach is therefore, in that respect, also established.

[42] A number of the breaches as alleged having been found, this Court must now consider whether any of the evidence gathered ought to be excluded pursuant to s. 24(2) of the *Charter*. That subsection provides that:

> (2) Where … a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[43] Pursuant to *R. v. Grant*, 2009 SCC 32, state conduct infringing *Charter* rights of an accused was to be measured under three lines of inquiry:

- Having regard to the seriousness of the *Charter*-infringing state conduct;

- Its impact on the protected interests; and then

- Weighed against society's interests in adjudication on the merits to determine whether, considering all of the circumstances, admission of the evidence would bring the administration of justice into disrepute.

[44] I find the least serious of the *Charter* breaches found in this case to be that of the officer eliciting evidence from Mr. Schafer prior to his access to counsel. And I say this because the officer, being on friendly terms already with the accused, was not intentionally eliciting incriminatory evidence but was, rather, admonishing Mr. Schafer for having taken advantage of the chance the officer had given him. Also, the evidence thereby elicited — namely, admission of alcohol consumption and admission of driving — would have been otherwise amply established even without those conversations. This is not the type of case where, for example, the police seek to establish rapport with an accused as a prelude to making a statement.

[45] For these reasons, I find, in this case, the impact on Mr. Schafer's *Charter*-protected interests would be at the lowest end of the range, in respect of that breach.

[46] The more serious of the *Charter* breaches here established are those relating to the breach of Mr. Schafer's s. 10(a) right to be informed of the reason for his detention and the insufficiently grounded demand for a roadside sample of his breath. This being

an impaired driving investigation commencing from the very moment of the second encounter, Mr. Schafer not being so advised was significantly impacted thereby regarding his ability to decide whether or to what extent to respond to the officer's questions or even to decide how close he would want to physically be to the officer.

[47] Their pre-existing friendship in the absence of being informed of his s. 10(a) *Charter* right would also have impacted a reasonable person in Mr. Schafer's position in thinking he might be speaking to the officer as a friend as opposed to as a person in authority investigating a criminal offence, even if he was not free to leave.

[48] For these reasons, the s. 10(a) breach is, under the circumstances of this case, further along the more serious end of the spectrum.

[49] The ungrounded roadside demand is an equally serious breach of Mr. Schafer's s. 8 right against unreasonable search and seizure. That breach and the sequence of events following had a significant impact on the accused by virtue of his arbitrary detention for a significant portion of the evening, notwithstanding that the sample taken roadside and the breathalyzer readings later taken at the detachment are very reliable evidence taken by relatively non-intrusive means, they are, nonetheless, a bodily substance compelled from the accused without any lawful basis and following an investigation the accused was not informed of when he should have been.

[50] I am mindful of society's interest in curbing instances of impaired driving and the importance of the breathalyzer certificate to the Crown's case. I also agree this case is not one of bad faith or, indeed, any misconduct by the police officer. To the contrary, it looks like he was doing his best to balance various factors at play in a small community

where he knew the accused. However, that does not immunize the state from the impact of that conduct as it relates to Mr. Schafer's *Charter*-protected interests.

[51] On balance, I find the admission of the evidence gathered in this case would indeed bring the administration of justice into disrepute. As such, the evidence tendered on this *voir dire* regarding the roadside screening result, the admissions made by Mr. Schafer regarding alcohol consumption and driving, and the results from the certificate of qualified technician shall be excluded from the evidence at trial.

[52] MS. CONNELLY: Thank you, Your Honour.

[53] As previously indicated, those pieces of evidence that are now excluded were what Crown was relying on, and Crown, as previously indicated, as well, has no other evidence to offer. If Your Honour declares the person not guilty or they're acquitted or if it's simply to withdraw the charge, I have no other evidence to provide.

[54] THE COURT: Ms. Lavidas, do you have any submissions?

[55] MS. LAVIDAS: Just that, at this point, I understand my friend is not proceeding on the count of impaired operation, so there's no further evidence before the Court, so the charges should be dismissed, in my view, Your Honour.

[56] THE COURT: In essence, my finding leads to the inevitable conclusion that there is no evidence with respect to the blood alcohol content. Is that Count 2?

[57] MS. CONNELLY: Yes.

[58] THE COURT: There being no admissible evidence tendered on Count 2, that count is dismissed.

[59] There being some evidence with respect to the officer's observations in advance of any of these breaches that I have found and in the absence made further submissions, it seems to me that evidence falls far short of proof beyond a reasonable doubt that Mr. Schafer's ability to exercise the care or control of a conveyance was in any way impaired, and so, on that basis, I would dismiss Count 1 as well.

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GILL T.C.J.